U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA L. MARTINET and U.S. POSTAL SERVICE,
POST OFFICE, Haines City, FL

Docket No. 02-815; Submitted on the Record;
Issued August 23, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review.

Appellant's claim filed on May 9, 1995 was accepted for cervical and lumbosacral strains and a lacerated left leg after appellant, then a 35-year-old rural carrier, was injured when her mail delivery vehicle was rear ended. She returned to part-time limited duty on August 21, 1995 and was released for full duty in March 1996.

To determine whether appellant continued to have any residuals from her injury, the Office referred appellant to Dr. Robert J. Pfaff, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on his May 16 and June 23, 1997 reports, stating that she was able to return to work full time, the Office proposed to terminate appellant's compensation in a notice issued on July 8, 1997.

Appellant disagreed with the proposed termination and submitted a report from her treating physician, Dr. Josephine Estampador-Tan, a practitioner in physical medicine. The Office terminated appellant's compensation on August 8, 1997. Appellant requested an oral hearing, which was held on June 24, 1998.

By decision dated September 30, 1998, the hearing representative found that Dr. Pfaff's opinion constituted the weight of the medical opinion evidence that appellant's work-related strains and leg lacerations had resolved and that she had no continuing disability from these conditions. The hearing representative noted that Dr. Tan, appellant's physician, failed to discuss how the 1995 work injury resulted in appellant's diagnosed myofascial pain syndrome. The hearing representative added that reports submitted by appellant from Drs. Ana D. Lipson and David Spalding, both Board certified in internal medicine, offered no opinion on the etiology of appellant's myofascial pain syndrome or fibromyalgia.

Appellant requested reconsideration, and the Office denied modification of its prior decision on October 26, 1999, noting that Dr. Tan again failed to discuss any causal relationship between the 1995 work injury and appellant's myofascial pain syndrome. The Office added that the July 17, 1998 report from Dr. Bernice Johnson, a chiropractor, was not based on a diagnosis of subluxation and therefore had no probative value.

By letter dated November 27, 1999, appellant requested reconsideration and submitted a November 17, 1999 report from Dr. Estampador. The Office denied modification on January 28, 2000. On January 6, 2001 appellant again requested reconsideration, which the Office denied on April 17, 2001 on the grounds that the evidence appellant submitted was cumulative and therefore insufficient to warrant merit review.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's claim for merit review.

The only Office decision before the Board on appeal is dated April 17, 2001, denying appellant's request for reconsideration. Because more than one year has elapsed between the last merit decision dated January 28, 2000 and the filing of this appeal on July 17, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

Section 8128(a) of the Federal Employees' Compensation Act[2] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3] Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[4]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[5] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[6]

[1] 20 C.F.R. §§ 501.2(c); 501.3(d)(2); *see John Reese*, 49 ECAB 397, 399 (1998).

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8128(a) ("the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.").

[4] *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

[5] 20 C.F.R. § 10.608(a) (1999).

[6] 20 C.F.R. § 10.606(b)(1)-(2).

Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[7]

With her request for reconsideration, appellant submitted no new medical evidence. The reports she submitted from six different physicians cover the time frame from 1995 to 1999, but were all in the record and were considered by the Office in its prior decisions. Therefore, appellant has failed to meet the subsection (iii) requirement of relevant and pertinent new evidence.[8]

Appellant has failed to show that the Office erred in interpreting the law and regulations governing her entitlement to compensation under the Act, nor has she advanced any relevant legal argument not previously considered by the Office. Inasmuch as appellant failed to meet any of the three requirements for reopening her claim for merit review, the Office properly denied her reconsideration request.

The April 17, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 23, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[7] 20 C.F.R. § 10.608(b).

[8] *See Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that appellant's failure to submit new and relevant evidence on reconsideration justified the Office's refusal to reopen his case for merit review).